United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2013

To Be Argued By: Phil Kunsberg

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO.

MICHAEL HOLUP,
CRAIG COPLEY,
ARTHUR ANTHONY DELORENZO,

Plaintiffs-Appellants,

-vs-

J. BERNARD GATES, Chairman,
Connecticut Board of Parole,
et al.,

Defendants-Appellees.

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P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR PLAINTIFFS-APPELLANTS

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STATEMENT OF THE CASE

This appeal is brought under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and challenges the practices and procedures governing parole release hearings of the Connecticut Board of Parole. The appellants are prisoners of the state of Connecticut who seek a declaratory judgment declaring that the Board of Parole violates due process of law when it denies them (a) the right of access to their central files prior to their parole hearings and (b) the right to assistance by a representative who can attend and participate in their parole hearings.

In May of 1975, the Yale Legal Services Organization was appointed to represent three Connecticut prisoners, Thomas Labonte, Howard Studley, and Michael Holup. Each of these men had filed an action in the United States District Court for the District of Connecticut, alleging that he had been denied parole without due process of law and seeking the full panoply of procedural rights at a new parole hearing. In each case, the Yale Legal Services Organization filed an amended complaint under 42 U.S.C. §1983 which named the individual members of the Connecticut Board of Parole as defendants and re-phrased the prisoners' claims in a prayer for declaratory relief. The three cases were consolidated by stipulation of the parties for a hearing on the merits, which took place on September 5, 1975, before Hon. M. Joseph Blumenfeld. In their post-trial brief, the prisoners withdrew their original claim for a full panoply of due process rights and instead sought only the right of pre-hearing access to their files and the right to assistance by a representative at the parole hearing.

Both Thomas Labonte and Howard Studley were released on parole after the hearing on the merits but before judgment. The court therefore dismissed their cases as moot,but reached the merits in the case of Michael Holup. It denied relief with respect to both remaining claims in a Judgment and Memorandum of Decision dated January 13, 1976. The Judgment also denied a motion by the prisoners for certification of a class action because the motion was untimely filed. In addition, the court dismissed, on the basis of the decision in Holup, the complaints of two other Connecticut prisoners, Craig Copley and Arthur Anthony DeLorenzo, who had filed actions which were identical in all material respects with that of Michael Holup.

After their complaints were dismissed, Craig Copley and Arthur Anthony DeLorenzo contacted the Yale Legal Services Organization and requested its assistance in prosecuting appeals. Accordingly, notices of appeal were filed for Michael Holup on January 26, 1976, for Craig Copley on February 9, 1976, and for Arthur Anthony DeLorenzo on February 10, 1976. On March 22, 1976, the District Court granted appellants' motion to supplement the record on appeal in the cases of Craig Copley and Arthur Anthony DeLorenzo with the entire record in the case of Michael Holup, in view of the fact that only the latter had been fully briefed and argued.

There are now three separate actions on appeal to this court, each of which presents the same issues. Counsel have consolidated these appeals by stipulation pursuant to Rule 3(b), F.R.App.P. Appellants have filed a motion accompanying this brief which requests the court to hear these appeals on the original record.

STATEMENT OF FACTS

The current practices and procedures of the Connecticut Board of Parole provide a prisoner with notice of his parole hearing, the right to present documentary evidence at the hearing, and a written statement of the reasons for a denial of parole. The Board does not provide prisoners with advance notice of adverse evidence. It does not allow them to present witnesses or to cross-examine adverse witnesses, and it does not permit a prisoner's lawyer or other representative to attend his parole hearing. The Board makes tape recordings of the hearings, but does not provide copies or transcripts of them to prisoners who request them. As a rule, Connecticut prisoners who have been denied parole are scheduled for reconsideration after a period ranging from six to nine months.

ISSUES PRESENTED

Whether the practices and procedures of the Connecticut Board of Parole violate due process of law in that they do not afford prisoners: (a) a right of access to their central files prior to their parole hearings; and (b) a right to assistance by a representative who can attend and participate in their parole hearings.

I. PAROLE IS IN EFFECT DEFERRED SENTENCING. A PRISONER IS ENTITLED TO PROCEDURAL PROTECTIONS ENSURING THE FAIRNESS OF THE PAROLE PROCESS WHICH ARE EQUIVALENT TO THOSE ENJOYED BY A CONVICTED CRIMINAL DEFENDANT WITH RESPECT TO THE SENTENCING PROCESS.

As the Chairman of the United States Board of Parole has noted, "the parole process is inseparable from the sentencing parocess." Sigler, Abolish Parole? 39 Fed. Prob. 42, 47 (June, 1975). "Parole legislation involves essentially a delegation of sentencing power to parole boards." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections, 86 (1967)(hereinafter cited as "Task Force Report"). These general observations are particularly true of the parole system in Connecticut for several reasons.

First, release on parole is a legitimate expectation of a criminal defendant sentenced to a term of incarceration under the laws of the state of Connecticut. J. Bernard Gates, Chairman of the Connecticut Board of Parole, testified at the trial of this action that "More than 95 percent [of Connecticut prisoners] are paroled at some time during their sentences .... This Board is the most liberal Board with paroles, I think, in the United States. We parole, I think by far, a larger percentage than any other board."[1/]

Second, release on parole is the realization of the normally appropriate penalty intended by the legislature and the courts of the state of Connecticut. It is not a matter of "grace," United States ex rel. Bey v. Connecticut State Board of Parole, 443 F.2d 1079, 1085 (2d Cir. 1971), nor even an award of leniency for good behavior. Studies have demonstrated that "actually prisoners serve

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1/ Transcript of the Record, Hearing on the Merits, 20-21, 50 (hereinafter cited as "Record"). In 1970, the comparable figure for the nation as a whole was 72%. National Advisory Commission on Criminal Justice Standards and Goals, Corrections, 389 (1973).

as much time in confinement where parole is widely used as in those where it is not." Task Force Report, supra at 62.

The Connecticut legislature has made the indeterminate sentence the ordinary penalty for serious crimes. An indeterminate sentence is mandatory in cases of class A or class B felonies and is optional in cases of less serious offenses.[2/] This provision for the regular use of indeterminate sentences transforms the traditional role of the Board of Parole as a dispensor of clemency with respect to normative penalties prescribed by the legislature and the courts. It makes the Board of Parole the ultimate arbiter of the appropriate sanction for a specific offense and thereby delegates to it the critical aspect of the sentencing power traditionally vested in the judiciary.

Moreover, judges have recognised that the likelihood of parole conditions any sentence which they impose and therefore take this fact into account in computing determinate as well as indeterminate sentences. "The parole implications of a se ence are a necessary and important factor for the consideration of the sentencing judge." United States v. Slutsky, 514 F.2d 1222, 1229 (2d. Cir. 1975 In a recent survey of federal judges, "[e]ighty-eight percent ... stated that they considered parole in sentencing. Forty-seven percent of judges, when they impose a Regular Adult sentence, generally expect that an inmate will be released on parole after serving one-third of the sentence." Project, Parole Release

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2/ Conn. Gen. St. §§53a-35 (1969). For a class A felony, the maximum term of the indeterminate sentence is fixed at life imprisonment and the minimum term may vary from 10 to 25 years. For class B, C, or D felonies, where the maximum term is greater than 3 years, the minimum term may not exceed half of the maximum. Id. These prescribed ranges of indeterminacy ensure that the Board of Parole has virtually unrestricted sentencing power, subject only to extreme limits reflecting the tolerance of public policy.

Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 882 n. 361 (1975); see also, United States v. Jenkins, 403 F. Supp. 407 (D. Conn. 1975). Determinate sentences imposed in anticipation of release on parole are in effect indeterminate sentences. The judge imposes what he regards as a maximum term of imprisonment knowing that it entails a minimum term dictated by the statute governing eligibility for parole. Such de facto indeterminate sentences, like the indeterminate sentences required by statute, amount to a referral of the sentencing decision to the Board of Parole.

Third, the Connecticut Board of Parole in accordance with a general trend has adopted the methods as well as the function of the sentencing judge. "The parole decision involves many of the same kinds of factors that are involved in the original sentencing decision." Task Force Report, supra at 86. Parole decisionmaking can no longer be distinguished from sentencing on the grounds that it involves extra-legal, expert judgments concerning a prisoner's rehabilitation or psychological development. A parole board which has the responsibility to set the norms of punishment must look primarily to factors relevant to that decision, such as the severity of a prisoner's offense and his prior criminal record. The Connecticut Board of Parole bases its decisions in large part on information contained in a prisoner's pre sentence report. See Record at 35-41. To the extent that the Board relies on such information available at the time of conviction, it appropriates the techniques as well as the purposes and powers of the sentencing judge.

The decisionmaking process of the Connecticut Board of Parole is in nearly all respects a deferred sentencing. The Constitution therefore requires

guarantees of procedural fairness at Connecticut parole hearings which are no less effective than those required at sentencing hearings. Criminal defendants have a right to counsel at their sentencing hearings, McConnell v. Rhay, 393 U.S. 2 (1968), and a conditional right of access to their presentence reports, United States v. Brown, 379 F.2d 285, 288 (2d Cir. 1972). Appellants here do not claim the right to appointed counsel, but only the right to avail themselves of assistance by counsel or by counsel substitute, such as a law student, a relative, or a friend. They contend that parole hearings should not be made an exception to the established principle that counsel is essential "at every stage of the criminal proceeding where substantial rights of a criminal accused may be affected." Mempha v. Rhay, 389 U.S. 128, 134 (1967).

Appellants additionally claim a right of access to their prison files analogous to the conditional right of criminal defendants to examine their presentence report prior to their sentencing hearings. This remedy would enable prisoners to supplement and correct the factual information available to the Board of Parole. The right of access to prison files prior to a parole hearing is even more critical than the right of access to the presentence report because a sentencing judge can make allowance for the possible inadequacy or inaccuracy of the information on which he relies by imposing an indeterminate sentence. Although this court has not yet recognized a constitutional right of access to presentence reports, it has severely criticized the withholding of them when unnecessary to protect compelling government interests: "the administration of justice would be improved by a liberal and generous use of the power to disclose." United States v. Fisher, 381 F.2d 509, 512 (2d Cir. 1967), cert. denied,

390 U.S. 973 (1968). In the context of parole hearings, where reliance on the presentence report has a greater import than at sentencing and where the procedural protection is less, access to the report is crucial to fairness and hence rises to the status of a constitutional right.

II. THE PROCEDURAL PROTECTIONS AT ISSUE HERE ARE CONSTITUTIONALLY MANDATED IF THEY WOULD SIGNIFICANTLY ENHANCE THE FAIRNESS OF PAROLE RELEASE PROCEEDINGS WITHOUT IMPEDING THE PROPER FUNCTIONS OF THE BOARD OF PAROLE.

This court's decisions in Haymes v. Regan, No. 75-2096 (2d Cir. Oct. 29, 1975), United States ex rel Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974),[3/] and Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), provide both a framework and a method for deciding the issues presented in this appeal. Johnson and Menechino set the minimum and maximum contents of the package of procedural protections which are constitutionally required in the context of parole release proceedings. Haymes dealt with claimed rights which fell within the limits established by Johnson and Menechino. The opinion in Haymes articulates the elements of the balancing test which determines whether a specified procedural protection is essential to due process of law in the context of the parole process.

The threshhold question of whether a prisoner's interest in prospective parole is sufficient to invoke the protection of the Due Process Clause of the Fourteenth Amendment was answered affirmatively by this court in Johnson v. Chairman, New York State Board of Parole, supra at 928, holding that "some degree of due process attaches to parole release proceedings."[4/] The court in Johnson

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3/ Johnson was subsequently vacated as moot sub nom. Regan v. Johnson, 41[illegible] U.S. 1015 (1974), because the plaintiff had been released on parole by [illegible] time the case came before the Supreme Court. Haymes reaffirmed the reasoning and result in Johnson and thereby resurrected whatever authority it had lost by virtue of its mootness.

4/ The appellate courts of three other circuits have followed Johnson in deciding that parole release proceedings are subject to constitutional due process protections. United States ex rel. Richerson v. Wolff, No. 75-1241 (7th Cir. Nov. 20, 1975; Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974); Childs v. United States Board of Parole, 511 F.2d 1270 (D.C. Cir. 1974). Only the Court of Appeals for the Sixth Circuit has declined to follow Johnson in this respect, Scott v. Kentucky Board of Parole, No. 74-6438 (6th Cir. Jan. 15, 1975) cert granted, 44 U.S.L.W. (U.S. Nov. 15, 1975).

distinguished its prior ruling in Menechino v. Oswald, supra, which denied relief to a plaintiff who sought an entire "package" of procedural rights at his parole release hearing. This package included the right to a summary of evidence before the Board, the right to counsel, the right to compel attendance of witnesses, and the right to confront and cross-examine adverse witnesses. In contrast, the plaintiff in Johnson sought only a written statement of reasons for the denial of parole. The court noted that:

> The issue before us in Menechino was not merely whether the prisoner desiring parole was entitled to a statement of reasons, but whether he was entitled to a whole gamut of due process rights which he sought as a package. . . . Johnson v. Chairman New York State Board of Parole, supra, at 926.

The ruling in Johnson was limited to a determination regarding the specific relief requested:

> . . . we conclude . . . that due process does not require the New York State Board of Parole to furnish state prisoners a written statement of reasons when release on parole is denied. Id at 934.

The Johnson court did not reach the question of what other procedural rights short of the complete package at issue in Menechino are required at parole release hearing.

In Haymes v. Regan, supra, this court addressed the question of whether the constitutional guarantee of due process required the New York State Board of Parole to disclose in writing the specific criteria for parole release which it employed in reaching a decision to deny parole. The court considered only this single element of due process and noted that in Johnson, it had likewise decided "only that due process required the Board to furnish state prisoners with a written statement of reasons when release on parole is denied." Haymes v. Regan, supra at 316. Haymes

held that the Board's failure to disclose release criteria did not amount to a "violation of fundamental due process," but like Johnson, it left open the question of whether other procedural protections, such as those sought by appellants in this action, are essential to ensure minimal fairness in parole release proceedings. Id.

This court arrived at its conclusion in Haymes v. Regan by means of a structured balancing test which it has developed and refined in the course of a general evolution of due process law.[5/] Judge Friendly has formulated this test as follows:

> The required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it. Friendly, "Some Kind of Hearing." 123 U.Pa.L.Rev. 1267, 1278 (1975).[6/]

In Haymes, the court focused its inquiry on the "need for and usefulness" of the claimed procedural protection because an assessment of the other aspects of the case material to the balancing test, namely the interest affected and the administrative burden, clearly favored judicial intervention on behalf of the prisoner.[7/] The court found that the primary purposes for disclosure of release criteria would be achieved by providing a prisoner with the written statement of reasons

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5/ Among the landmarks of this evolution are Hannah v. Larche, 363 U.S. 420 (1960); Goldberg v. Kelley, 397 U.S. 254 (1970); Morrissey v. Brewer, 408 U.S. 471 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Wolfe v. McDonnell, 418 U.S. 539 (1974); Goss v. Lopez, 419 U.S. 565 (1975).

6/ See Haymes v. Regan, supra at 316; Frost v. Weinberger, 515 F.2d 57, 66 (2d Cir. 1975); Cardaropoli v. Norton, No. 75-2005 at 84 (2d Cir. Sept. 29, 1975) (quoted in full).

7/ "The inmate's stake in the Board's decision to grant or deny him parole is, of course, significant . . . . And we recognize that any direct burden which might be imposed on the Board in disclosing its release criteria would be less than oppressive." Haymes v. Regan, supra at 317.

required by Johnson.[8/] The court concluded that disclosure of release criteria did not satisfy the balancing test because (1) it would infringe upon the "vast discretionary authority" of the Board of Parole, (2) it would be largely redundant and (3) it would not "appreciably enhance the protection accorded the parole applicant." Id. at 317, 319.

As argued below, the private interest at stake in this action is the same as in Haymes and the potential administrative burden is less. In contrast to the remedy sought in Haymes, the procedural safeguards which appellants seek in this action would not encroach upon the lawful discretion of the Connecticut Board of Parole. There is an acute need for these procedures which is not satisfied by the current practices of the Board, and, if implemented, they would significantly "add to the fairness of the proceeding." Haymes v. Regan, supra at 319.

8/ The purposes of disclosing release criteria are (1) "to protect the inmate from arbitrary and capricious decisions or actions grounded on impermissable considerations" and (2) "to enable the reviewing body to determine whether parole has been denied for an impermissable reason, or indeed, no reason at all." Id. at 318. A written statement of reasons does not, however, fulfill a third purpose of disclosure of release criteria, which is to enable a prisoner to prepare in advance of his parole hearing an argument in support of his entitlement to parole. The procedural rights sought in this action would serve this third, as yet unfulfilled purpose.

III. APPLICATION OF THE BALANCING TEST EMPLOYED IN HAYMES v. REGAN TO THE ISSUES IN THIS CASE REQUIRES THAT CONNECTICUT PRISONERS BE ACCORDED (A) A RIGHT OF ACCESS TO THEIR CENTRAL FILES PRIOR TO THEIR PAROLE HEARINGS AND (B) A RIGHT TO ASSISTANCE BY AN ADVOCATE WHO IS ALLOWED TO PARTICIPATE IN THE PAROLE HEARING.

A. The Refusal of the Connecticut Board of Parole to Allow Prisoners to Inspect Their Central Files Prior to Their Parole Hearings Deprives Them of any Meaningful Opportunity to Prepare for the Hearing and Unnecessarily Jeopardizes the Accuracy of the Board's Fact-Finding Process.

An examination of the Connecticut parole process reveals that: (1) the decisions of the Connecticut Board of Parole are based almost entirely on information contained in prisoners' central files; (2) this information is often erroneous or incomplete or both; (3) a procedure which afforded prisoners an opportunity to inspect their files would enable them to correct and supplement this information; and (4) the Connecticut Board of Parole could implement such a procedure without incurring any significant administrative costs or inconvenience and without restricting the proper exercise of its discretion. The testimony given at the trial of this action evinces both the critical importance of the factual information contained in prisoners' central files to the decisionmaking process of the Connecticut Board of Parole, and the prejudice to prisoners which results from the Board's refusal to disclose that information to them.

In response to the question, "What sort of information does the Board rely on?," the Chairman of the Board enumerated the typical contents of the files, which include a prisoners' presentence report, his institutional progress reports, data pertaining to his criminal record, character evaluations by prison psychiatrists and caseworkers, letters from government officials or from private parties containing relevant factual allegations or recommendations, and a miscellany of

other documents which the Government has acquired in the course of its dealings with the prisoner.[9/]

Prisoners are not given either actual or constructive notice of the contents of their files. They are not informed at the time when they are interveiwed by psychiatrists that the psychiatrist's report will be made part of the file available to the Board of Parole.[10/] Likewise, they are not notified of what other documents are collected in their central files. In veiw of the fact that the central file serves as a respoitory for all documents pertaining to a prisoner which the state happens to accumulate, the prisoners have no means to learn or to surmise the contents thereof.

The decisions of the Connecticut Board of Parole hinge on the information supplied by the central files. The Board evaluates the severity of a prisoner's offense by considering the various accounts of it contained in his file rather

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9/ "The Board has, first of all, in the file the presentence investigation, the orientation diagnostic report at the institution which is completed after the person has been at the institution during the orientation period, the progress report which includes some more or less statistical information such as sentence and eligibility date and appearances before the Pardon Board, any warrants or any other charges awaiting litigation, the actions of the Classification Committee which assigns the man in the institution as far as custody is concerned and employment, etc., the conduct record of the person with information on each misconduct if there has been misconducts, the work record where the person has worked, his adjustment on each of the jobs, whether or not the person has been out on furloughs, whether or not the person is on work release, the medical report, the educational report of the education program participation, the so-called social section which has to do with family relationships and visits, correspondence, and this type of information.

In addition to this the file includes, where the Board requests it, psychiatric evaluations, which on certain types of cases the Board does request psychiatric evaluations.

Also, in some institutions it includes team reports . . . . Treatment team reports . . . .

Then there is, in addition, every piece of information that comes in, whether it be positive or negative. I'm talking now about correspondence from attorneys, sometimes from Courts--very seldom--from persons interested; friends, families, relatives. (Footnote 9 and 10 cont'd on following page).

than by limiting its view to the terms of the judgment of convictions.[11] Prior to a scheduled parole hearing the members of the hearing panel "laboriously" peruse the prisoner's central file.[12] While reading these files, each member of the panel as a rule formulates questions of fact relevant to the parole decision. The hearing is largely devoted to the resolution of these factual issues, which are critical to the decision of whether to grant or deny parole.[13]

Thus, the central files supply the Connecticut Board of Parole with a background of factual information concerning a prisoner which the Board assumes

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9/ (Cont'd). Any type of correspondence, pro or con, that comes in, a copy of it goes into each of the files for each member of the panel so that they have this at the time of the hearing." Record at 35-36.

10/ Id., at 42.

11/ At the hearing on the merits, Judge Blumenfeld discovered this policy during the following interchange with Chairman Gates:

"Q: Now, what weight, if any, do you give to the fact or do you give to the information that he was charged with a more serious offense?
A: Well, your Honor, it could be more serious or less serious, according to the plea bargaining process.
But the fact is as long as the sentence is correct, the time is correct, that is not too important as far as our process is concerned because we have the presentence investigation that describes the offense.
A man may have been charged, for instance, with aggravated assault and may have pleaded to breach of peace. But we would have to take into consideration the factors involved in breach of peace which were the factors in the aggravated assault." Record at 41.

12/ Record at 100-101, see also, Id. at 108-109, 112.

13/ Chairman Gates testified as follows:

"Q: Mr. Gates, is it ever determined by a review of the files prior to the hearing that an inmate will be denied parole?
A: Never, as far as I know.
Q: After this preliminary review of the file, do certain questions occur to the Board and are they reserved for some kind of determination at the hearing?
A: I'm certain there are. I'm certain there are. . . .
May I go further and say sometimes the questions are asked before the hearing, if they have to do with subjects that could be answered (cont'd)

to be true and which may never come to the prisoner's attention. The contents of the files also determines the specific factual issues which will be raised at a parole hearing and which will dictate the parole decision. The Board's published "Standards for Granting Parole" look to virtually every aspect of a prisoner's history and personality, and hence do not afford him notice of these specific factual issues which will govern the outcome of his case.[14/] A prisoner is first apprised of these issues and allowed to address them during his parole hearing when members of the Board of Parole confront him with the questions which they regard as crucial. The Supreme Court has held that such belated notice does not meet the constitutional standards of due process because it "defers the time of disclosure to a point when it is of limited use . . . in preparing [a] defense or explanation." In re Gault, 387 U.S. 1, 25 (1966). Due process

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13/ (Cont'd). before then. There may be a request of me, a telephone call, concerning a question.
Of Course, the Board expects that certain questions will be able to be answered by the man, himself . . . . Record at 50-51.

14/ These standards are enumerated and described as follows:

1. The nature and circumstances of the inmate's offense and his current attitude toward it.
2. The inmate's prior criminal record and his parole adjustment if he has been paroled previously.
3. The inmate's attitude toward family members, the victim, and authority in general.
4. The inmate's institutional adjustment, including his participation and progress in the areas of the institutional program important to his self-improvement.
5. The inmate's employment history, his occupational skills, and his employment stability.
6. The inmate's physical, mental and emotional health.
7. The inmate's insight into the causes of his past criminal conduct.
8. The inmate's efforts to find solutions to his personal problems such as addiction to narcotics, excessive use of alcohol, the need of academic and vocational education, etc., and his use of the available resources related to such problems in the institutional program. (Cont'd).

requires that fair notice of adverse evidence be given prior to the hearing based on that evidence, so as to "alert the petitioner to the dangers ahead" and to prevent the hearing from being "conducted on the level of blindman's bluff." Simmons v. United States, 348 U.S. 397, 405 (1955).

It is obvious that Connecticut prisoners, who are never given notice of the facts regarded as relevant to their case or who are first given such notice in the course of their parole hearing, are prevented from marshalling evidence or preparing argument to contest or supplement the factual assumptions of the Board of Parole. The unfairness which results from this disability is aggravated by the unreliability of the information contained in the central files, which is the basis of those assumptions. The files are notoriously incomplete and unenlightening:

> Far too typically, overworked institutional case-workers must attempt to gather information on a prisoner from brief interviews with him, institutional records, and letters to community officials. This information is often fitted into a highly stereotyped format. Frequently, the sameness of reporting style and jargon makes it very difficult for board members to understand the individual aspects of a given case and assess them wisely. This can lead to decisions which are arbitrary and unfair as well as undesirable from a correctional standpoint. Task Force Report, supra, at 63.

Moreover, the files do not discriminate between verified information on the one hand and opinion, conjecture, or rumor on the other. They are:

14/ (Cont'd). 9. The adequacy of the inmate's parole plan. The latter includes the environment to which the inmate plans to return, the character of those with whom he plans to be associated, and the adequacy of his residence and employment program.

State of Connecticut Board of Parole, Statement of Organization and Procedures, Plaintiffs Exhibit No. 4, 9-10 (1975).

> replete with hearsay, inferences, and conclusions . . . . The presentence report discloses no identifiable sources for many adverse accusations contained therein, nor does it even classify them as 'reliable.' Masiello v. Norton, 364 F. Supp. 1133, 1136 (D. Conn. 1973).

The members of the Board of Parole who use the files have neither the time nor the resources to cure these defects by independent investigation. As a result, they act upon information which lacks even the most rudimentary guarantees of accuracy:

> it is equally clear that the examiners and the Board failed to winnow the wheat from the . . . . It is evident that the parole officials did not read and assess accurately the contents of the presentence report . . . . Id. at 1136-37.

Finally , the information in the files is often simply erroneous. This court has noted that gross errors inevitably and regularly ensue from the normal course of bureaucratic record-keeping which produces the files:

> Time and time again the government through various agencies has demonstrated . . . that serious errors have been made in this field. Cardaropoli v. Norton, supra at 87, quoting Judge Zampano's statement at the trial of Masiello v. Norton, supra.

A procedural mechanism which would allow a prisoner to examine his central file well in advance of his parole hearing would provide a remedy for both the inadequate notice and the unilateral, uncorroborated fact-finding which results from the current procedures of the Connecticut Board of Parole. Concededly prior access to the file would not give the prisoner actual notice of the specific factual issues which the Board will regard as particularly significant and which it will therefore select for adjudication at the hearing. Nevertheless, if a prisoner were permitted to review his file, he could discover the salient demerits and gaps in his documentary record, which in most cases would give rise

to the particular questions which the Board of Parole reserves for the hearing. If he prepared to address the adverse or incomplete aspects of the information contained in his file, his preparation would as a rule correspond to the special concerns of the Board. He would therefore be able to meet the issues raised at his hearing and would not be subjected to the "prejudicial surprise" which fair notice is designed to prevent. United States v. Marshal, 364 F. Supp. 1005, 1008 (S.D.N.Y. 1973).

A prisoner thus apprised of the relevant issues could make a significant contribution to the fact-finding process of the Board of Parole. He would have personal knowledge of the events referred to by the documents in his file and could therefore check the accuracy of the information contained in those documents. If the information were erroneous, slanted, or incomplete, he could assemble evidence which would correct those defects and which he could submit to the Board prior to his parole hearing or during the course of the hearing. Although prisoners would naturally offer evidence biased in their favor, the presentation of an alternative version of the relevant facts would assist the Board of Parole in making accurate findings. The requirement that a fact-finding tribunal hear both sides of a story is a fundamental principle of our judicial and administrative process:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. Green v. McElroy, 360 U.S. 474, 496 (1959).

The usefulness of this procedure has been proven by experience and repeatedly recognized by the Supreme Court:

> It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. In re Gault, supra, at 21; see also Goss v. Lopez, 419 U.S. 565, 580-81 (1975); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring).

These paramount purposes which would be served by granting Connecticut prisoners a right of access to their central files are offset only by a negligible administrative burden which would result from the implementation of the right and which should not be accorded any weight whatsoever which in the application of the Haymes balancing test Judge Blumenfeld noted in his opinion in this action that

> since the Board already prepares three copies of each folder at least one week in advance of the hearing for the use of its members, there would be only a small additional burden in preparing another folder. The problem of confidential information could be handled by marking confidential items as such at the time they are added to the file . . . . The practicality of this arrangement is illustrated by the procedures of the United States Board of Parole which allow an inmate to examine his file prior to his hearing. United States Bureau of Prisons Policy Statement No. 2211.8, June 12, 1975. Memorandum of Decision, at 11-12, n.7.

As Judge Blumenfeld's remarks suggest, copies of prisoner's files could be maintained at the prison for inspection by the prisoners. Supervision of documents could be facilitated by limiting prisoners' access to their files to a specified location and to specified hours during the week. Confidential items could be removed from the files made available to the prisoners and replaced by a notice briefly describing the document removed. However, such exceptions to full disclosure would have to be narrowly circumscribed in order

to ensure the effectiveness of the remedy. The withholding of a document should be permitted only if its disclosure would jeopardize personal safety, interfere with law enforcement proceedings or invesitgative techniques, or constitute a clearly unwarranted invasion of personal privacy.[15/] If government officials are given unfettered discretion to designate documents as confidential, they may be tempted to avoid challenges by withholding the adverse evidence which will critically affect a parole decision.

The procedure for affording prisoners access to their files could be made even less burdensome by simply giving prisoners copies of the documents in their files and allowing them to retain these copies in their personal possession. The administrative costs of doling out the documents and monitoring their return would thereby be eliminated. Any conceivable detriment which the Government would suffer from disclosure would not be increased if it relinquished exclusive possession of the documents. In short, this remedy is feasible, inexpensive, and would not add to the duties of prison officials.

The final stage of the Haymes balancing test weighs any restraints on the authorized discretion of the Board of Parole. In denying relief below, Judge Blumenfeld apparently regarded this consideration as one which shifted the balance against recognition of a prisoner's right of access to his central file. He noted that "the Board is entrusted with extremely broad discretion and grave responsibility." Memorandum of Decision, at 12. But this broad discretion is in no way restricted by affording prisoners an opportunity to examine their

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15/ These are the exceptions to the disclosure procedure adopted by the United States Bureau of Prisons. See Policy Statement No. 2211.8, supra.

files and to contest or supplement the information contained therein. If the Board provided such an opportunity, it would not thereby become obligated or constrained to accept the prisoner's version of the facts. It could disregard or refuse to hear arguments presented by a prisoner which it considered irrelevant, and hence would not be forced to alter its criteria for parole decisionmaking. The Board would forfeit only the discretion to base its decisions on secret and uncontested evidence. It is impossible to justify in the name of discretion the State's refusal to reveal to a prisoner what it knows about him, particularly when that information serves as the ground for a decision which critically affects the prisoner's liberty.16/

16/ One superficially tenable argument for continuing to refuse disclosure begins by noting that "psychiatric and psychological information in the files, including the results of intelligence tests and 'projective tests' attempting to measure personality traits, could easily be misunderstood by an inmate and hinder his readjustment " Franklin v. Shields, 399 F. Supp. 309, 316 (W.D.Va. 1975); see also Lehrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 222, 238-46 (1969). This argument goes on to contend that if the Government were required to disclose all such psychological information to the inmate/subjects, it would curtail the use of psychological evaluation rather than tolerate the harmful effects of disclosure. As a result, the Board of Parole's range of inquiry would be contracted, and it would lose discretion to consider a prisoner's psychological profile.

This argument is fallacious, at least with respect to the Connecticut Board of Parole, for three reasons. First, the Government violates a prisoner's right to privacy when it coercively subjects him to psychological examinations; hence any lawful examination must be conducted with the prisoner's consent, which is conditioned upon a right to know the results of the examination unless that right is expressly waived. Second, the members of the Connecticut Board of Parole have no special expertise in psychiatry. The Board consists of laymen from all walks of life (for example, businessmen) who serve part time and who have not received any special training in psychology or in any of the other social sciences. See Record at 95, 102-103. If the psychiatric judgments of such non-experts are permitted to determine a prisoner's entitlement to conditional liberty, they should at least be open to informed criticism. Third, the Connecticut Board of Parole has waived any right it may have to refuse disclosure of psychiatric reports by reading excepts from these reports to the prisoner at his hearing. At Michael Holup's (Cont'd).

Three courts have concluded that "on the balance . . . the interests of the individual inmates in seeing their files outweigh the burden on the state in affording such access and removing potentially dangerous information therefrom." Franklin v. Shields, 399 F. Supp. 309, 316 (W.D.Va. 1975); Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974); Childs v. United States Board of Parole, 371 F. Supp. 1246 (D.D.C. 1973), aff'd in part, 511 F.2d 1270 (D.C. Cir. 1974). By applying the balancing test developed in Haymes v. Regan, supra, and its antecedents, this court should reach the same conclusion. The need for and usefulness of the procedure are paramount; the administrative burden and the constraints on lawful discretion which would result from it are negligible or nonexistent.

B. In The Context Of Parole Proceedings, The Right To Assistance By An Advocate Is Essential In Order To Effectuate The Acknowledged Right To A Meaningful Hearing.

The Connecticut Board of Parole recognizes the right of a prisoner who is eligible for parole to have a hearing at which he can attempt to show that he deserves to be paroled. See Connecticut Board of Parole, Statement of Procedures, supra at 7.

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require

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16/ (Cont'd). hearing, the Board introduced his psychiatric report as a subject of discussion and used it to prove that he had made inconsistent statements. See Transcript of Michael Holup's Parole Hearing, Plaintiffs' Exhibit No. 3, at 3, 6. The Board violates due process of law when it thus excerpts passages from psychiatric reports in order to support its accusations, while at the same time withholding from the prisoner the complete report, which may as a whole present him in a favorable light. See Pre-Parole Psychiatric Evaluation of Michael Holup, included in Michael Holup's File, Defendants' Exhibit D.

> that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. Mullane v. Central Hanover Trust Co., 339 U.S. 306 313 (1950).

The purpose of the parole hearing is to give the members of the hearing panel a first-hand acquaintance with the prisoner,[17] to enable him to present evidence in support of his application for parole,[18] and to enable him to refute or mitigate adverse evidence; in short "to let him tell his side of the story in order to make sure that an injustice is not done." Goss v. Lopez, supra at 580. Unfortunately, many, if not most prisoners are unable to adequately assemble and present evidence and to "tell their side of the story."

The Connecticut Board of Parole's "Standards for Granting Parole," supra, footnote 14, refer to factual matters, such as "the nature and circumstances of the inmate's offense" and "the environment to which the inmate plans to return," which require proof by evidence accessible only to someone who has mobility and free use of communications facilities. Prisoners, whose outlets to the world beyond the prison walls are severely restricted, are in effect precluded from gathering such evidence.[19] Moreover, most prisoners lack the skills to effectively

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17/ "The focus of the parole board hearing is an evaluation of the potential parolee and an estimation of his chances for success on parole. This is essentially a personal evaluation. . . an informal hearing at which the members are able to meet with the prisoner, question him, and crystallize their judgment." Memorandum of Decision, at 9.

18/ "Ordinarily the right to present evidence is basic to a fair hearing." Wolff v. McDonnell, supra at 566.

19/ The current regulations of the Connecticut Board of Parole do not prohibit prisoners from obtaining the assistance of counsel or counsel substitute in preparing evidence and argument for presentation to the Board. However, it is likely that the Board's exclusion of counsel from the parole hearing discourages their use at an earlier stage of the proceedings.

organize and present the evidence which they do obtain. "Penitentiaries include among their inmates a high percentage of persons who are totally and functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." Johnson v. Avery, 393 U.S. 483, 487 (1969). Lastly, even those prisoners who possess the skills to competently present argument on their own behalf are rendered incapable of doing so by the anxiety which they suffer in connection with their parole hearing. A prisoner's stakes in his parole hearing are enormous.[20/] They naturally react to the prospect of an event which vitally affects their liberty by becomong anxious to an extent which paralyzes their ability to communicate. As a result, they cannot tell their side of the story at the hearing, and the opportunity which the hearing purports to provide is lost.[21/]

The recognition of a prisoner's right to avail himself of the assistance of counsel or counsel substitute at all stages of the parole proceeding would

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20/ The Board holds the key to the lock of the prison . . . . The result of the Board's exercise of its discretion is that an applicant either suffers a 'grievous loss' or gains a conditional liberty. His interest accordingly is substantial. Childs v. United States Board of Parole, supra at 1278.

21/ The case of appellant, Michael Holup, poignantly demonstrates this fact. At the close of his parole hearing, he made the following statement to the members of the hearing panel:

> Reverend, since I've received a notice from the Community Board this month, I've had to go through a series of GI tests because of--thinking about it. Will I make it, won't I make it, will I make it, won't I make it. It's worked on my stomach, my nervous system so much that I had to go throw-up all hours of the night, that I've had to go through a series of tests to find out if there was anything wrong with my insides. Transcript of Michael Holup's Parole Hearing, supra at 9.

"appreciably enhance the protection accorded the parole applicant," Haymes v. Regan, supra at 319. It would elevate the prisoner's right to participate in his parole hearing from a legal formality to a real assurance of fairness. Paul W. Tappan, a respected penologist with many years of experience in state parole systems, describes the role of counsel in the parole process as follows:

> Prisoners are generally quite ineffectual in organizing the information they should present to a parole board, important as the hearing is to them, and they have little talent for arguing to the board. To put it simply, they lack those qualities that are important to their success: qualities that are the peculiar strength of the effective advocate. For those reasons the counsel of an attorney may be quite invaluable in preparing and presenting a case to the board . . . . More specifically, it is important that there be presented effectively to the paroling authority the positive aspects of an offender's case that are relevant to his parole, matters that may be quite inadequately elucidated in the institution's records and unknown to the board, and matters in particular that the offender could not easily himself present. For example, the writer, as a parole board member, has had brought more effectively to his attention by counsel than by most parole candidates, details relating to the prisoner's family and his relationships in the home, the quality of community feeling toward the offender, the victim's attitude, and other matters. Tappan, The Role of Counsel in Parole Matters, 3 Prac. Law. 26-27 (Feb. 1957).

In addition, the attendance of an outside observor at parole hearings would provide a safeguard against parole decisions based on improper criteria. The Connecticut Board of Parole in large part nullifies the right of prisoners to a parole hearing by prohibiting assistance by counsel at the hearing.

The administrative burden of according parole candidates such a right to assistance by an advocate is insubstantial. Over twenty jurisdictions allow counsel

to appear at parole release hearings.[22/] The fears expressed in Menechino v. Oswald, supra at 409-10, that this policy would necessitate protracted and litigious hearings have apparently proved unwarranted. The role of the prisoner's advocate at the parole hearing can be regulated so as to render insignificant any administrative burden which results from his or her participation. "[T]he board does not lack the power to so structure the proceedings as to maximize the lawyer's contribution and minimize his potential for disruption." United States ex rel Bey v. Connecticut State Board of Parole, 443 F.2d 1079, 1088 (2d Cir. 1971). In particular, the Board can limit the scope, time, and duration of the advocate's presentation. For example, the United States Board of Parole has promulgated the following regulation:

> Prisoners may be represented in hearings by a person of their choice. The function of a prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner may request . . . . The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement. 28 C.F.R. §2.12.

Finally, the Connecticut Board of Parole in particular lacks standing to complain of the administrative burden which would result from allowing prisoners' representatives to participate in parole hearings in view of the fact that it has adopted an even more burdensome but constitutionally inadequate substitute procedure. The Board's Statement of Procedures, supra at 8, provides as follows:

> Although attorneys, relatives, and other interested persons are not permitted to appear at

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22/ See O'Leary & Nuffield, A National Survey of Parole Decisionmaking, 19 Crime & Delinq. 378, 386 (1973).

> hearings, they may submit to the Board written information pertinent to any case. In addition, such persons are invited to confer with the Chairman or his assistant at the Board's office prior to the parole hearing in which they are interested. The Chairman then provides each member of the hearing panel with a written memorandum concerning the information received at all such conferences.

Chairman Gates testifed that the conferences authorized by this provision are held "very frequently," in probably 40 percent of parole cases, and that "[a]t times we're swamped with them." Record at 38-39. These preliminary conferences do nothing to alleviate the unfairness caused by prohibiting representatives from giving assistance during a parole hearing to prisoners who, because of anxiety or lack of verbal skills, cannot effectively present evidence or explanations on their own behalf. The Connecticut Board of Parole would probably reduce its administrative burdens by allowing prisoners' advocates to participate in parole hearings instead of meeting with the Chairman on a separate occasion.

Judge Blumenfeld stressed the fourth element of the Haymes balancing test in the part of his opinion which concludes that "the balance tips against representation by counsel at parole hearings." Memorandum of Decision at 10. He suggested that the prisoner's representative would obstruct the proper functioning of the Board of Parole:

> While a representative might be able to make a more polished and thorough presentation of the prisoner's strong points, he would be more likely to frustrate the ability of the parole board members to personally evaluate the personality, sincerity and credibility of the potential parolee. This, in turn, would limit their ability to estimate the prisoner's readiness for and likelihood of success on parole." Id.

This concern is entirely unwarranted. The representative would not screen the prisoner from the view of the Board of Parole. The recognition of a prisoner's

right to assistance by an advocate would not prevent the Board from limiting the advocate's active role to a pre-determined stage of the hearing and reserving the remainder for an informal discussion with the prisoner.[23/] The prisoner would not be less observable during that period of time by virtue of the silent presence of his representative.

Thus, the application of the Haymes balancing test requires recognition of a prisoner's right to assistance by a representative at his parole hearing, as well as of his right to prior access to his central file. The right to assistance by counsel or counsel substitute is necessary in order to effectuate the right to a meaningful hearing and would greatly advance the achievement of that end without imposing any significant administrative burden on the Connecticut Board of Parole or unduly infringing upon its discretion. The principles enunciated in Goldberg v. Kelly, supra at 269, 270, are pertinent here:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. . . .
>
> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safe-

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23/ The current regulations of the United States Board of Parole structure parole hearings in this manner. 28 C.F.R. §2.12, quoted supra, p. 29. These regulations permit the prisoner's representative to remain present throughout the hearing. To do otherwise would largely defeat the purposes of affording a right to assistance by a representative. If he were excluded from the portion of the hearing devoted to a discussion with the prisoner, he could not later take initiative in responding to questions which the prisoner failed to answer and could not deter the use of impermissable decision-making criteria.

> guard the interests of the recipient. We do not ancitipate that this assistance will unduly prolong or otherwise encumber the hearing.

C. The State's Primary Interests Align With Those Of The Prisoner-Appellants In This Action and Weigh In Favor Of Increased Procedural Safeguards Of The Parole Process.

The state shares the prisoner's interest in procedures which result in a grant of parole whenever it is warranted, and the state has a further interest in procedures which ensure accurate judgments and thereby prevent a grant of parole to a prisoner likely to violate its conditions. Such procedures also have an inherent value which accrues even in cases where they do not alter or influence the final judgment. The recognition of rights associated with due process of law fosters the belief by all participants in the proceeding that justice has been done. In particular, an inmate denied parole at a hearing at which he was accorded those rights is less likely to become embittered in the manner described in United States ex rel. Bey v. Connecticut State Board of Parole, supra at 1079.

> One certain way to increase a prisoner's sense of resentment and to discourage his will eventually to return to a normal life would be to deny him basic safeguards essential to the fundamental fairness of a decision to deprive him of the liberty he gained upon parole release.

This statement applies with equal force to prisoners whose expectation of parole has been defeated. The state has a compelling interest in commanding the respect of all its citizens.

Even if the administrative costs of according prisoners due process of law at parole hearings were truly burdensome, that cost would have to be borne.

Consideration of administrative problems in the determination of due process rights has weight only as a limiting factor which guards against unfeasible remedies. The "interest of administrative efficiency" can never justify the abridgement of constitutional rights. United States ex rel. Marcial v. Ray, 247 F.2d 662, 669 (2d Cir. 1957).

Finally, appellants concede that the recognition of the procedural rights which they seek might impose some constraints on the discretion currently exercised by the Connecticut Board of Parole. The disclosure of central files would promote clear statement of the factual premises of the Board's decisionmaking process, and the participation of counsel in parole hearings would constrain board members to articulate their intuitive judgments. The members of the Board would therefore become less able to make parole decisions based entirely on their personal sense of a prisoner's potential to become a law-abiding citizen. However, this aspect of the Board's discretion is not a legitimate government interest. "[I]t is inconsistent with our whole system of government to grant such uncontrolled power to any officials, particularly over the lives of persons." Task Force Report, supra at 83.

IV. IN APPLYING THE HAYMES BALANCING TEST TO THIS ACTION, THIS COURT SHOULD REVISE ITS PRIOR FACTUAL ASSUMPTIONS CONCERNING THE NATURE OF PAROLE PROCEEDINGS IN THE STATE OF CONNECTICUT.

One of the elements of the traditional balancing test for determining what process is due in any given situation is "the nature of the proceeding." Hannah v. Larche, supra at 442. This court's previous applications of the Due Process Clause to parole hearings in the state of Connecticut have been based on mistaken factual assumptions concerning the nature of those hearings and have fostered an underestimation of the necessity for procedural safeguards.

In Menenchino v. Oswald, supra at 405, this court noted that the determination of what process is due "requires an understanding of the function and procedures of the New York Board of Parole." The court went on to make the following findings of fact:

> In the first place the Board of Parole is not appellant's adversary .... There are no "charges" or accusations against appellant. Nor is the Board necessarily called upon in deciding whether he should be released on parole, to resolve disputed issues of fact, which might be the occasion for use of skills associated with lawyers, judges and the judicial process. Id. at 407.

The court in Menechino adopted the description of parole hearings given by Justice Burger in Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir. 1963):

> Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae.

In Bey v. Conn. St. Board of Parole, supra at 1087, the court found that parole decisions were based on expert judgments which could not be challenged or

improved by "the advocate's role in a decision making process":

> A decision to revoke parole, like a parole release determination, inevitably involves the discretionary application of principles and knowledge derived from study and experience in fields such as psychology, sociology, and penology - where an ordinary lawyer can claim no special expertise.

The more recent opinion in Johnson v. Chairman, N.Y. St. Board of Parole, supra, did not revise these assumptions. The court held that due process required a written statement of the reasons for denial of parole even in the context of the type of parole hearing described in Menechino. The court in Johnson, supra at 927, expressly adopted the finding in Menechino that a parole release determination "is not an adversarial proceeding in which 'charges' are preferred and disputed issues of fact presented."

Appellants do not insist that these descriptions are patently false, but rather contend that they distort the true nature of parole hearings in the state of Connecticut, and that the courts have wrongly applied relaxed standards of due process based on this distorted view. The testimony of J. Bernard Gates establishes that parole decisions hinge on issues of fact which are determined at the parole hearings.[24/] The courts have wrongly assumed otherwise. Moreover, these issues are not resolved by the Board in a non-adversarial manner by conference with the prisoner, or during the Board's private deliberation. The Board confronts prisoners with its interpretations of their behavior, and the prisoner is then expected to rebut these "charges" which he has just heard for

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24/ See footnote 13, supra, and accompanying text.

the first time.[25] The rebuttal of many prisoners may consist only of responses such as, "No - that's not true,"[26] yet it is accurate to say that these allegations made by the Board of Parole constitute "disputed issues of fact." The courts of this Circuit have been mistaken in rejecting outright the analogy between the issues resolved at a parole hearing and those determined at a courtroom trial or at a parole revocation hearing.

The characterization of Connecticut parole hearings as nonadversarial is erroneous for a second reason. At the commencement of these hearings, the Board ordinarily requests that the prisoner present an argument to show his entitlement

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25/ For example, the following interchange took place during Michael Holup's parole hearing:

Board Member: In October of '74 prior to your last hearing you were interviewed by the psychiatric folks here.
Michael Holup: Yes, sir.
Board Member: And you very emphatically told them that you were here for a crime for which you were not guilty. Do you recall that?
Michael Holup: Yes, sir.
Board Member: Within a month you have a letter, pardon me, in December, this was October, two months to the day later you write Mr. Gates a letter and said I went into court and pled guilty to the charge and have a new sentence of 6-12.
Michael Holup: Yes.
Board Member: And now you can't have it both ways.
Michael HOlup: I realize that.
Board Member: So, one is a fabrication - is that correct?
Michael Holup: That's correct.
Board Member: I'm having it hard -- finding it difficult -- to reconcile a fabrication with your (inaudible) feelings about prevaricating.
Michael Holup: Well, see I pleaded guilty on the recommendation of the attorney.
Board Member: At that time - maybe you did lie when you pled guilty - is this correct?

Transcript of Michael Holup's Parole Hearing, supra at 4.

26/ Transcript of Thomas Labonte's Parole Hearing, Plaintiffs' Exhibit No. 1, at 6.

to parole, and then proceeds to challenge any argument which he offers.[27] The Board does not act as "parens patriae" when it thus imposes a burden of proof on the prisoner. The Board admittedly does not have a legal duty to oppose a prisoner's application for parole, and it differs in this respect from a prosecutor in a criminal trial. Yet the Connecticut Board of Parole does assume an adversary role which the courts have heretofore ignored.

The judicial notion of the Board's expertise is also misconceived. The members of the Connecticut Board of Parole serve part-time and maintain vocations which bear no relation to their official duties. There are no specific educational or other prerequisites to appointment as a member of the Board, and appointees are not given any formal training before they qualify as members.[28] The Board may indeed make discretionary judgments applying " principles ... [of] psychology, sociology, and penology," but its knowledge of these fields is not

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27/ This practice is exemplified by the following excerpts from transcripts of Connecticut parole hearings entered in evidence in this action:

Mr. Sanchez: Mr. Studley, is there anything you would like to say to the Board? Since you've been going to parole?
Mr. Studley: No, I'm afraid not.
Mr. Sanchez: Nothing you have on your mind to say to the Board? See, as you know, you have been incarcerated here for quite a while, and you have escaped lately, and - What can I be in the future? What do you have to offer this Board - are you ready to live in society?

Transcript of Howard Studley's Parole Hearing, Plaintiffs' Exhibit No. 2, at 1.

Board Member: Now, as I understand you were involved with two others in a holdup of an A & P and you said "not guilty" originally and then you were found guilty and that you were involved in robbery with violence in New York on a previous occasion. Now, what I'd like you to do is to tell us why you feel you should be paroled at this time.

Transcript of Michael Holup's Parole Hearing, supra at 1.

28/ The only official criteria for selection of members of the Connecticut Board of Parole are those set forth in Connecticut General Statutes, §54-124a, as follows: "[Members] ... shall be qualified by training and experience for the consideration of matters before them."

necessarily "derived from study and experience." A lawyer or other representative of a prisoner perhaps could not claim any "special expertise" in these fields, but neither can the Connecticut Board of Parole. See Bey v. Conn. St. Board of Parole, supra at 1087 (quoted more fully above).

The Supreme Court has noted that judicial definitions of due process rights are not "graven in stone" and must be reformulated in the light of changed circumstances. Wolfe v. McDonnell, supra at 571-572. A reassessment of the nature of parole hearings in the state of Connecticut is overdue.

CONCLUSION

This court has adopted a step by step approach in determining "what process is due" with respect to parole release hearings. Morrissey v. Brewer, supra at 481. For all practical purposes, the judgment in this action will constitute the last step, at least with respect to Connecticut parole proceedings. Given the fact that Johnson requires a written statement of reasons and Haymes rejects the claim for specified parole release criteria, and the fact that the Connecticut Board of Parole now accords prisoners notice, a hearing, and the right to present evidence, the only elements of the traditional panoply of due process rights which will remain unadjudicated after judgment in this action will be the rights to present witnesses, to cross-examine adverse witnesses and to obtain a record of the proceedings.[29/] The administrative burden of affording these rights will probably preclude their recognition. In short, if this court affirms the trial court's decision in this case it will in effect hold that the current procedures of the Connecticut Board of Parole satisfy the requirements of due process.

This result would make parole release proceedings a vestige of the casual disposition of prisoners' conditional liberty which Morrissey v. Brewer, supra, Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Wolff v. McDonnell, supra, denounced

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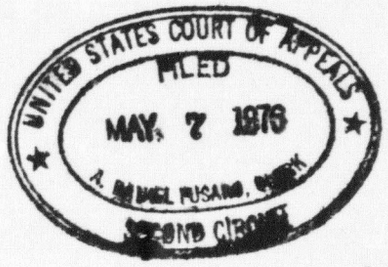
29/ The Connecticut Board of Parole has adopted the practice of making tape recordings of parole hearings, but it does not make these recordings available to prisoners who request them.

and curtailed. As argued above, Connecticut parole proceedings which do not accord prisoners a right of access to their central files or a right to assistance by counsel or counsel substitute entail a likelihood of unfairness which violates evolving standards of due process. The frequency of parole release in the state of Connecticut in effect gives prisoners a vested interest in parole which makes the denial of parole an injury equivalent to parole revocation. The adjudication at Connecticut parole release hearings of factual issues raised by the information contained in the prisoner's central file makes those hearings turn on "disputed issues of fact" in the same manner as parole revocation hearings. Johnson v. Chairman, N.Y. St. Board of Parole, supra at 927. Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, supra, established procedural protections pertaining to parole revocation hearings which are far more stringent then those sought by appellants in this qction.[30/] This general legal framework strengthens the application of the Haymes balancing test set forth above.

30/ Parolees facing revocation of parole have a right to disclosure of the evidence against them, Morrissey v. Brewer, supra at 489. They have a right to assistance by retained legal counsel in all cases and a right to assistance by appointed counsel when warranted by the indigency of the prisoner and the complex nature of the case, Gagnon v. Scarpelli, supra at 790. In addition, they have the right to present witnesses and the right to cross-examine adverse witnesses, Morrissey v. Brewer, supra at 489. Appellants here seek only less rigorous counterparts of the right to disclosure of adverse evidence and the right to assistance by counsel.

76-2013



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MICHAEL HOLUP, ET AL., -vs- J. BERNARD GATES, ET AL.	Docket No.'s 76-2013, 76-2018, 76-2045

CERTIFICATION

I hereby certify that a true copy of the reproduced portions of the record of the Hearing of the Merits in the above-entitled action, presented by appellants for filing on April 27, 1976, has been mailed, postage prepaid, to Stephen J. O'Neill, Assistant Attorney General, 340 Capitol Avenue, Hartford, Connecticut, this 4th day of May, 1976.

Philip Hunsberger

Together they require that the relief which appellants seek in this action be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief for Plaintiffs-Appellants has been mailed, postage prepaid, to Stephen O'Neill, Assistant Attorney General, 340 Capitol Avenue, Hartford, Connecticut, this 2nd day of April, 1976.

Philip Kunsberg